

### **QUESTION PRESENTED**

Whether Florida's intangible property tax on appellant's accounts receivable having a legitimate business situs in Florida is invalid under the Commerce Clause by virtue of the "internal consistency" test.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1990

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No. 88-1847

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FORD MOTOR CREDIT COMPANY,  
*Appellant,*

v.

DEPARTMENT OF REVENUE, STATE OF FLORIDA,  
*Appellee.*

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**On Appeal from the District Court of Appeal  
of Florida, First District**

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**BRIEF FOR APPELLEE**

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**OPINIONS BELOW**

The opinion of the District Court of Appeal of Florida, First District (J.S. App. 1-5) is reported at 537 So. 2d 1011. The order of the Supreme Court of Florida declining to exercise its jurisdiction (J.S. App. 21) is reported at 542 So. 2d 988. The final order of the Florida Department of Revenue (J.S. App. 6-20) is not reported.

**JURISDICTION**

Appellant Ford Motor Credit Company (Ford) asserts jurisdiction over this appeal under 28 U.S.C. §§ 1257(2) and 2101(c) (1982). Appellate jurisdiction is proper in

this case if those provisions apply. In particular, this case involves an appeal challenging the judgment of the Florida District Court of Appeal finding a Florida statute valid under the federal Constitution. 28 U.S.C. § 1257(2) (1982). A notice of appeal to this Court (J.S. App. 21) was filed in the District Court of Appeal on April 5, 1989, within 90 days after the Supreme Court of Florida denied review on February 22, 1989 (J.S. App. 24; J.A. 1). 28 U.S.C. § 2101(c). The appeal was docketed on May 12, 1989, and the Court noted probable jurisdiction on June 11, 1990.

In 1988, however, Congress eliminated mandatory appellate jurisdiction under 28 U.S.C. § 1257(2) (1982), making certiorari the sole means of reviewing state court judgments. Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988). If that Act applies, this Court does not have appeal jurisdiction. There is a serious question whether Public Law 100-352's elimination of appeal jurisdiction applies to this case. Taking note that this Court has noted *probable* jurisdiction in this case, and that the Court has expressed its reluctance in *certiorari* cases to reconsider a grant of review at the merits stage (see *City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988)), we analyze the question of jurisdiction in what follows.

Section 7 of Public Law 100-352 states that the Act "shall not . . . affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before [September 25, 1988]." 102 Stat. 664. The opinion of the District Court of Appeal, First District, was filed on September 13, 1988—before the critical date under Section 7. J.S. App. 1. The order of the Florida Supreme Court denying review was issued on February 22, 1989—after the Section 7 date. J.S. App. 21. Whether Section 7 preserves the appeal right in this case, therefore, turns on whether the District Court of Appeal opinion or the Supreme Court of Flor-

ida order constitutes "the judgment or decree of a court" within the meaning of Section 7.<sup>1</sup>

The two obviously relevant statutes that use comparable phrases point in opposite directions. On one hand, if the Section 7 phrase were to borrow its meaning from 28 U.S.C. § 1257, the appeal here would be proper. It has long been held that the state court "judgment[]" or "decree[]" that is "reviewed" under Section 1257 in circumstances like the present is the final state court decision on the merits, even if rendered by an intermediate appellate court, and not the denial of discretionary review by the state supreme court. *American Ry. Express Co. v. Levee*, 263 U.S. 19, 20-21 (1923); R. Stern, E. Gressman, & S. Shapiro, *supra*, at 142. On the other hand, if the Section 7 phrase were to borrow its meaning from 28 U.S.C. § 2101(c), the appeal would not be proper. Section 2101(c) states that an appeal bringing "any judgment or decree" in a civil case to the Supreme Court "for review" must be filed within 90 days after "entry of such judgment or decree." The 90-day period does not begin to run in circumstances like the present until the denial of discretionary review by the state supreme court, which is therefore the "judgment or decree" under Section

<sup>1</sup> As noted at the jurisdictional stage in this Court (Motion to Dismiss or Affirm 11-12), there is some doubt whether the District Court of Appeal "entered" a "judgment or decree" (Pub. L. 100-352, § 7) when it "filed" (J.S. App. 1) its opinion on September 13, 1988, because the opinion expressly states that it was not to become final until the expiration of time for (and disposition of) a rehearing motion. J.S. App. 1. Nevertheless, we do not press this construction of Section 7 of Public Law 100-352. Precedent suggests that "entry" occurred for purposes of 28 U.S.C. § 1257. See *Market St. Ry. v. Railroad Comm'n*, 324 U.S. 548, 550-52 (1945); R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 311-12 (6th ed. 1986). Moreover, review of the District Court of Appeal decision apparently could have been sought in the Supreme Court of Florida immediately after September 13, 1988, without the filing of any rehearing motion. See Fla. R. App. P. 9.020(g), 9.120(b) (1989).

2101(c). *American Ry. Express Co. v. Levee*, 263 U.S. at 21; R. Stern, E. Gressman, & S. Shapiro, *supra*, at 312.

For several reasons, we think that the better view is that the Section 7 phrase "judgment or decree" refers, like Section 2101(c), to the order of the state supreme court denying review. First, Section 2101(c) seems to provide a stronger analogy than Section 1257 for deciding the meaning of the Section 7 phrase. Like Section 7, Section 2101(c) is a timing provision with concrete, jurisdictional consequences—determining whether this Court has appellate jurisdiction over an appeal filed on a particular date. By contrast, it is essentially a matter of pleading form that, under Section 1257 as it has been construed, an appeal like the present must be identified as taken from the intermediate appellate court rather than from the state supreme court decision.

Second, the specific language of Section 7, which preserves "the right to review" certain state court judgments, points to the same interpretation. Thus, there is no right to ask this Court to review an intermediate appellate court decision until review is sought from the state supreme court (if available) and the state supreme court has spoken. *See, e.g., Benton v. Maryland*, 395 U.S. 784, 786 (1969); R. Stern, E. Gressman, & S. Shapiro, *supra*, at 142. After the state supreme court has spoken, a litigant has a fully ripened right of immediate review; after the intermediate appellate court ruling, the litigant has only a still-partly-inchoate right of eventual review (which would ripen if the state supreme court leaves the intermediate court decision standing). To construe Section 7 as preserving only the former better accords with Section 7's core function—to draw an inherently arbitrary but preferably bright line determining which cases have ripened enough to retain the now-repealed right of appeal.

Finally, the policies that led Congress to abolish mandatory appeal jurisdiction support resolving a close question against retaining such jurisdiction, leaving litigants

in the position of Ford with the option of seeking review by certiorari. Indeed, this case perfectly illustrates why Congress abolished mandatory appeal jurisdiction in favor of permitting this Court to apply its usual standards for deciding whether to grant certiorari. There is no lower court conflict on the Commerce Clause question here; there is, in fact, no other lower court decision even addressing the question. *See* J.S. 8-20. Nor is this particular case inherently important. Ford concedes that there is no actual multiple taxation in this case. Brief for Appellant 23 n.9; *see* note 11, *infra*. Ford also concedes that, as far as the internal consistency test is concerned (which is the only legal claim raised before this Court), Florida may do precisely what it has done in this case, namely, tax the full value of Ford's Florida intangibles—if only Florida ceased taxing the out-of-state intangibles of other taxpayers, namely, Florida domiciliaries. Brief for Appellant 25. In these circumstances, it seems to us that a grant of certiorari would not be warranted. It was precisely to relieve this Court of the obligation to hear such cases that Congress enacted Public Law 100-352. Section 7 of that law should be construed here to further that aim.<sup>2</sup>

## STATEMENT

### A. Florida's Intangible Property Tax

During the years at issue in this case (1980-1982), Florida imposed a tax on intangible personal property. Fla. Stat. § 199.032 (1983).<sup>3</sup> With specified exceptions,

<sup>2</sup> Effective September 25, 1988, Section 5(c) of Public Law 100-352 also repealed 28 U.S.C. § 2103 (1982), which directed the Court to treat an improperly filed appeal as a petition for a writ of certiorari. If, however, this Court, in its discretion, were to treat the jurisdictional statement as a petition for a writ of certiorari, the petition should be denied. We note that, at the time it filed its jurisdictional statement, Ford filed a separate petition for a writ of certiorari presenting the same questions. *See* J.S. 2-3.

<sup>3</sup> The tax remains in force in much the same form. *See* Fla. Stat. ch. 199 (1989).

the tax applied to most forms of intangible personal property, including loans, accounts receivable, and stock. *Id.* § 199.023. The tax was assessed annually on January 1 and was measured by the value of covered intangible property on that date. *Id.* § 199.103. The rate was one mill—one thousandth, or one tenth of one percent—of the assessed value. *Id.* § 199.032(1). Thus, a loan with a balance of \$10,000 on January 1 would be assessed a tax of \$10.

The subject of this action, which alleges impairment of or discrimination against interstate commerce, is the tax as applied to accounts receivable held by firms in the business of financing the sale, leasing, or servicing of personal property. J.A. 5; J.S. App. 10 (stipulation of facts and chart showing types of intangible property at issue). Florida imposed the tax on “any person, regardless of domicile, who own[ed] or ha[d] management, custody, or control of intangible property that ha[d] acquired a business situs in [Florida].” Fla. Stat. § 199.052(1) (1983). The statute then defined “business situs,” as applied here, to include accounts receivable “arising out of, or issued in connection with, the sale, leasing, or servicing of . . . personal property in the state.” *Id.* § 199.112(1). This intangible tax based on business situs thus applied without regard to whether the taxpayer was a domiciliary or non-domiciliary of Florida. Indeed, the legislature expressly stated that the intent behind the tax was “that no nonresident, either by himself or through an agent, transact business in the state without paying the same tax which the state would impose on residents transacting the same business.” *Ibid.*<sup>4</sup> See *Allis-Chalmers Credit Corp. v. Department of Revenue*, 456 So. 2d 899, 902 (Fla. App., 1st Dist.), review dismissed, 458 So. 2d 271 (Fla. 1984), citing *Smith v. Lummus*, 149 Fla. 660, 6 So. 2d 625, 628 (1942).

<sup>4</sup> The terms “domiciliary” and “resident” are interchangeable. Fla. Admin. Code 12C-2.001(1).

The application of the business situs intangible property tax was narrowed to intangibles tied to Florida in three ways important to this case. First, the tax statute specified when a sale was deemed to occur in Florida for purposes of determining whether an account receivable arising out of such a sale was subject to taxation. The statute said: “Sales of tangible personal property are in this state if the property is delivered or shipped to a purchaser within this state, regardless of the f.o.b. point or other conditions of the sale.” Fla. Stat. § 119.112(1) (1983). Florida interpreted that provision—consistent with the practice under the Florida sales tax (see Fla. Admin. Code § 12A-1.064(1))—as stating not only a sufficient condition but also a necessary condition for application of the business situs tax. That is, if the personal property was delivered or shipped outside Florida as part of the sale—and not merely by the purchaser immediately after sale—then the sale was not treated as having occurred in Florida; and neither a sales tax nor a business situs intangible property tax would arise out of that sale. In short, of the various aspects of a sale, it was delivery—not, for example, title transfer or placement of an order or f.o.b. point—that uniquely determined the place of sale.<sup>5</sup>

Second, Florida did not apply its intangible tax to all receivables arising out of Florida sales as defined. In addition, Florida asked whether the taxpayer itself had a sufficient connection with Florida. A taxpayer’s incorporation in the state or maintenance of its principal place of business, of course, supplied the required connection with the state. For a non-domiciliary, the sufficiency of its nexus with Florida depended on a number of fac-

<sup>5</sup> Ford’s statement to the contrary relies on appellee’s response to interrogatory 1(a). Brief for Appellant 6. Ford has misread the response, which expressly addresses only the taxability of “legal residents”—i.e., domiciliaries—of Florida. J.A. 18. As noted below, Florida residents are taxed on all of their covered intangibles, without regard to business situs.

tors, including whether the taxpayer operated a permanent business and, if so, whether its in-state agents performed discretionary, i.e., more than merely clerical, functions. See Fla. Admin. Code § 12C-2.006(3)(b); *United States Shoe Corp. v. Department of Revenue*, 508 So. 2d 1252, 1255 (Fla. App., 1st Dist.), review denied, 518 So. 2d 1274 (Fla. 1987); *Allis-Chalmers Credit Corp. v. Department of Revenue*, 456 So. 2d at 902. For example, an isolated sale on credit of a car in Florida by a nonresident who was temporarily in the state would not give rise to a taxable intangible; nor would a nonresident firm's routine sales to Florida purchasers if the selling firm used Florida agents merely to solicit orders but not to make any discretionary decisions. *United States Shoe Corp.*, *supra*.

Third, the business situs tax was imposed on the accounts receivable of covered taxpayers only *as long as* the receivables themselves retained a sufficient connection with Florida, even if the taxpayer retained its business presence generally. For example, with respect to secured car loans such as those involved in this case, the business situs intangible property tax was not imposed if the car (security) and purchaser (debtor) as well as the servicing of the loan all moved outside Florida—even if the financing company (taxpayer) continued its overall operations in Florida.<sup>6</sup> There was no formula for determining when an intangible lost its nexus to Florida, and there are no definitive rulings on whether the tax was imposed when the security or the debtor or the servicing of the intangible, but not all three, moved out-

<sup>6</sup> "Servicing" in a state means—using the definition offered by Ford when it defined that term for its interrogatories—that the individual with the authority to sell, pledge, or hypothecate the intangible, or to enforce or refrain from enforcing the rights of the obligee, and the responsibility for exercising stewardship over the intangible, is located in that state. See Letter from Neal B. Shniderman to J.C. O'Steen (Oct. 17, 1986).

side Florida.<sup>7</sup> Rather, consideration was required of the various ways in which the particular intangible—through its management or investment in Florida, its use in a Florida business, its being secured by Florida property, or its other relation to Florida—continued to take advantage of Florida laws, courts, and benefits. See Fla. Admin. Code § 12C-2.006(3)(b).<sup>8</sup>

Business situs was the only basis for imposing intangible property taxes on the accounts receivable of non-domiciliaries (like appellant Ford). Florida domiciliaries, however, were subject to additional intangible property taxes. Unlike nonresidents such as Ford, Florida domiciliaries also paid an intangible property tax of 1 mill on the value of their covered intangibles (on January 1), including accounts receivable, without a business situs in Florida. Fla. Stat. 199.052 (1983); Fla. Admin. Code § 12C-2.006(1). This domiciliary intangible tax on out-of-state intangibles was due on all such intangibles, regardless of whether they were subject to another state's intangible tax based on business situs. Fla. Admin. Code § 12C-2.006(1); *Florida Steel Corp. v. Dickinson*, 328 So. 2d 418 (Fla. 1976); *Florida Steel Corp. v. Dickinson*, 308 So. 2d 623, 624 (Fla. App., 1st Dist. 1975), *aff'd*, 328 So. 2d 418 (Fla. 1976).

## B. This Litigation

1. *Facts.* The stipulated facts on which the case comes to this Court (J.A. 2-12) show that the intangibles at issue—accounts receivable owned by appellant Ford, which is not a domiciliary of Florida—fall squarely under Florida's business situs intangible property tax. Dur-

<sup>7</sup> The position of the Department of Revenue has been that an account receivable remained subject to the business situs tax if the servicing remained in Florida, even if the debtor and security left the State. See J.A. 18 (response to interrogatory 1(c)).

<sup>8</sup> Much of the foregoing description of the business situs intangible property tax is now codified at Fla. Stat. § 199.175 (1989).

ing the years in question (1980-1982), Ford had a substantial presence in the state, operating a number of permanent branch offices, with several hundred employees, that handled the business of financing wholesale and retail sales of Ford Motor Company automobiles to Florida dealers and consumers (as well as certain other financing operations). J.A. 4. There is no dispute here that all of the accounts receivable at issue arose out of the sale, leasing, or servicing of personal property in Florida, within the meaning of Fla. Stat. §199.112(1) (1983). Nor is there any dispute here that, subsequent to their origination in Florida, the accounts receivable at issue retained their required nexus to Florida through, for example, the servicing of the intangibles, the presence of the security, and the presence of the debtors. In particular, most of the accounts receivable at issue arose out of sales of automobiles delivered to or located in Florida and involved debtors residing in Florida. J.A. 4.

Receivables growing out of retail sales had numerous contacts with Florida. To begin with, the Court should assume—because there is no allegation or stipulation to the contrary—that all of the retail accounts receivable arose out of sales by Florida dealers of automobiles delivered in Florida. *See* J.A. 8-12. As to financing, when a dealer sold a car, Ford “actively competed with local banks to provide financing.” J.A. 11. A Florida branch of Ford would consider whether to accept financing and, if so, pay the dealer for the car directly or through a Florida bank. Although the branch would send the original of the financing contract to Ford’s Michigan headquarters, the Florida branch would retain the car title, a copy of the financing contract, and the background information on the consumer. The Florida branch would also prepare and make monthly Florida documentary stamp payments. The consumer would make payments on the loan either directly to the Florida branch or to a Florida financial institution, which handled the money

pursuant to instructions from Michigan headquarters. When the loan was paid off, the Florida branch would notify the Florida government that the lien on the car was satisfied and send the title to the owner. J.A. 11-12.

Receivables growing out of wholesale sales had comparably strong connections to Florida. J.A. 8-11. As to the underlying sales, the placement and acceptance of the orders and the delivery of the cars occurred in Florida: Florida dealers placed their orders for cars with the Florida office of Ford Motor Company, which would order the cars from out-of-state assembly plants for delivery to Florida.<sup>9</sup> Most dealers, upon solicitation by appellant Ford’s Florida branch offices, financed their wholesale purchases by obtaining a line of credit with Ford. The Florida branch performed the investigation required to determine, and in some cases made the decision, whether to extend a requested line of credit. Under that financing arrangement, when cars ordered by a dealer were shipped, a Michigan Ford employee would authorize a draw on the line of credit and credit the dealer’s account with Ford Motor Company. J.A. 8-9. The dealer would make monthly payments to the Florida branch of Ford, which would deposit the payments in a Florida bank account.<sup>10</sup> When a dealer sold a car, it paid to the Florida

<sup>9</sup> The standard agreement between Ford Motor Company and dealers provided that, unless otherwise specified, title would pass to the dealer (or financing firm) upon delivery of a car to the carrier outside Florida (*see* Exh. 3 to Pre-Hearing Stipulation ¶ 11(b), at 12-13), but, as noted above, title transfer does not determine the place of sale under the Florida scheme. In any event, even the practical significance of the title-transfer provision is unclear, because the standard agreement also provided that the risk of loss remained with Ford Motor Company or the carrier during shipment. *Id.* ¶ 11(c), at 13.

<sup>10</sup> Ford generally limited the amount to be kept in the wholesale deposit accounts in each of its branches’ banks, requiring that portions of each account be transferred to Ford’s “pooling bank” outside Florida. A Florida branch’s own operations were paid for out of another bank outside Florida. J.A. 9.

branch of Ford both the principal balance on its wholesale receivable for that car and, upon billing by the Florida branch, the outstanding accrued interest. J.A. 9-10.

2. *Proceedings.* After a hearing based on the foregoing stipulated facts, appellee Department of Revenue determined that Ford owed approximately \$1.2 million in business situs intangible property taxes on its accounts receivable for 1980-1982, plus penalties and interest. J.S. App. 6-20. Although Ford did not contend that any other state actually taxed the receivables at issue,<sup>11</sup> it argued that Florida's tax was invalid because of the potential for such taxation if other states adopted both a business situs and a domiciliary intangible property tax. The Department stated that it lacked jurisdiction to rule on that argument. *Id.* at 13. The Department did, however, re-

<sup>11</sup> In fact, Ford, a Delaware corporation with its principal place of business in Michigan, has not been subject to multiple taxation of its Florida intangibles. J.A. 3. Ford acknowledges a Michigan domicile. Brief for Appellant 23 n.9. At least since 1980, not only has Michigan exempted companies such as Ford from its intangible property tax altogether (Mich. Comp. Laws § 205.133 (b)(12) (1986)), but even where the intangible property tax applies, Michigan has excluded from the tax on domiciliaries any intangibles that are both "placed in the hands of a manager or agent" outside Michigan and either "invested in a course of repeated transactions in obligations of persons residing outside [Michigan] or secured by property located outside [Michigan]." Mich. Comp. Laws §§ 205.131(c), 205.132(a) (1986). (A non-domiciliary is subject to the Michigan intangible property tax only as to property meeting the same conditions *inside* Michigan. *Ibid.*). Hence, even aside from the complete exemption from the tax, Ford would not be subject to the Michigan intangible property tax on accounts receivable managed in Florida and secured by Florida property.

Ford does not acknowledge Delaware as a domicile, and there is a question whether Delaware could claim Ford as a domicile for the present purposes based on incorporation alone. See *Wheeling Steel Corp. v. Fox*, 298 U.S. 193, 211 (1936). In any event, at least since 1980, Delaware has imposed no property tax on intangibles. 9 Del. Code § 8102 (1989).

ject Ford's argument that the tax Ford was required to pay was unfair on that ground and Ford's contention that it lacked a business situs in Florida. *Id.* at 13-14.

The District Court of Appeal, First District, affirmed. J.S. App. 1-5. The court first rejected Ford's basic premise that no more than one state may impose a property tax on the intangibles, pointing out that this Court has long repudiated that premise. J.S. App. 3, citing *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942), and *Curry v. McCannless*, 307 U.S. 357 (1939). The court explained that "since appellant has extended its activities regarding its intangibles to Florida and has availed itself of the benefits of the laws of several states with regard to this property, those several states, including Florida, may each impose a tax upon such intangible property." J.S. App. 3. The court next concluded that the Commerce Clause did not call for a different result, citing decisions in which this Court refused to apply a different analysis under the Commerce Clause from its analysis under the Due Process Clause of the Fourteenth Amendment (relied on in *Curry* and *Aldrich*). J.S. App. 3-4, citing *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949), *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939), and *Pacific Tel. & Tel. Co. v. Tax Comm'n*, 297 U.S. 403 (1936). The court also observed that the business situs property tax was not integrally related to (let alone a tax on) an interstate commercial activity. The court explained that the tax had only an incidental and indirect effect on interstate commerce. J.S. App. 4.

The District Court of Appeal then rejected Ford's reliance on the internal consistency test as an argument for invalidating Florida's application of its business situs intangible property tax to Ford's accounts receivable, an argument based on the proposition that multiple taxation could conceivably result if other states adopted such a tax as well as a domiciliary intangible tax. The court noted that the internal consistency test has been applied by this Court only to franchise and excise taxes, includ-

ing taxes on corporate income and business activities. J.S. App. 4-5, citing *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266 (1987), *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987), *Armco, Inc. v. Hardesty*, 467 U.S. 63 (1984), and *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159 (1983). The Florida court distinguished such taxes from property taxes, pointing to decisions of this Court that made just such a distinction. J.S. App. 4-5, citing *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 448 (1980), and *Pullman's Palace-Car Co. v. Commonwealth*, 141 U.S. 18 (1891).

After declining to apply the internal consistency test as Ford requested, the District Court of Appeal stressed its continued adherence to the constitutional bar on discriminatory advantaging of local businesses over interstate businesses. This case, the court pointed out, involved no such discrimination. J.S. App. 5. As noted above, Florida equally imposed the business situs intangible property tax on all persons, whether residents of Florida or not.

The Florida Supreme Court subsequently denied review. J.S. App. 21.

#### INTRODUCTION AND SUMMARY OF ARGUMENT

Ford claims constitutional protection against paying the Florida business situs intangible property tax on an unusual basis. Ford does not, and cannot, argue that the accounts receivable at issue were outside Florida's taxing jurisdiction or that Florida was barred from taxing their full value: Ford expressly concedes that Florida could do so. Brief for Appellant 25. Nor does (or can) Ford argue that Florida was discriminating against it by exempting from the same tax a Florida resident competing against Ford in the financing business: the business situs intangible tax applied equally whether or not the taxpayer was a resident of Florida. Ford's claim is that the Commerce Clause excuses it from paying the prop-

erty tax because *other* persons (i.e., its Florida domiciliary competitors) paid an *additional* tax (the domiciliary property tax on out-of-state intangibles) and that, if the same additional tax had been imposed on Ford where it is domiciled—which Ford concedes not to be the case, Brief for Appellant 23 n.9; note 11, *supra*—Ford would have been subject to two taxes on its Florida intangibles. This doubly abstract claim, based on another state's theoretical adoption of a Florida tax that is not imposed on Ford, presents no valid ground for invalidating the tax that Florida did impose on Ford.

I. The tax imposed on Ford—the business situs intangible property tax—readily meets the standards for Commerce Clause validity set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). To begin with, Ford's accounts receivable plainly had a substantial nexus with Florida, and the measure of the tax (the value of the receivables) bore a fair relation to the protection provided Ford by Florida. See *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). The accounts receivable arose out of sales activity in Florida, took advantage of Florida business offices and financial institutions, and relied on Florida's protections of Florida lenders on loans involving Florida debtors and secured by Florida property.

The business situs intangible property tax was also fairly apportioned. Ford concedes as much when it acknowledges that Florida was perfectly entitled to tax the full value of all of the accounts receivable at issue (if only Florida had refrained from taxing other persons' other intangibles). Brief for Appellant 25. Ford's concession is correct: because the accounts receivable had a proper business situs in Florida and nowhere else, Florida was entitled to impose its business situs intangible property tax on their full value. Moreover, this Court's precedent, *State Tax Comm'n v. Aldrich*, 316 U.S. 174 (1942); *Curry v. McCanless*, 307 U.S. 357

(1939); *Liverpool & L. & G. Ins. Co. v. New Orleans*, 221 U.S. 346 (1911), establishes that the Florida tax was fairly apportioned. That precedent makes clear that there is no due process bar to the taxation of intangible property at its full value by a state where it has a legitimate (unique) situs, and the fair apportionment requirement of Commerce Clause analysis is no more demanding than the Due Process Clause. See, e.g., *Container Corp. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983); *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 227-28 (1980).

The external and internal consistency tests, considered as part of the apportionment analysis (*Goldberg v. Sweet*, 109 S. Ct. 582, 588-89 (1989)), are passed by the tax actually imposed on Ford. There is no external consistency question raised in this case, which is hardly surprising because Florida was not taxing more than its reasonable share of an interstate activity. *Id.* at 589. And the business situs intangible property tax—considered without regard to the tax on domiciliaries (see pages 17-18, 26-38, *infra*)—was itself internally consistent because, contrary to Ford's representations, "sale" and "delivery" were not alternative bases for imposition of the tax, either generally or as applied to the facts as stipulated here. If all states had the same business situs tax, none of Ford's accounts receivable would have been doubly taxed.

As to the final prong of the *Complete Auto* analysis, the Florida tax did not discriminate against out-of-state competitors. Florida gave no exemption from the business situs intangible property tax, or any offsetting tax benefits, to Florida residents competing with Ford for the financing of Florida sales. Indeed, the Florida tax was expressly designed to ensure that all such competitors paid the same tax on accounts receivable arising out of Florida sales.

II. This Court should reject Ford's attempt to extend the internal consistency test to override the conclusion that follows from a direct application of the *Complete Auto* analysis to the business situs intangible tax. To begin with, precedent does not support Ford's claim. No decision of this Court has ever applied the test, as Ford would have the Court do here, based on the hypothetical adoption by other states of a tax imposed by the taxing state on persons other than the complaining taxpayer. Moreover, of the three cases in which this Court has invoked the internal consistency test in striking down taxes, two involved overt discrimination against out-of-state businesses or sales in favor of in-state competitors or sales (*Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. 232 (1987); *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984)), and one involved a state's failure to apportion its tax according to the very basis on which it taxed—use of its highways (*American Trucking Ass'n v. Scheiner*, 483 U.S. 266 (1987)). This case involves neither situation and would require a quite different use of the test.

This Court, in fact, would have to repudiate substantial precedent in order to accept Ford's argument in the present context. Although the internal consistency test is, by its terms, concerned with preventing certain kinds of multiple taxation, this Court has long rejected complaints about even actual multiple taxation (let alone merely hypothetical multiple taxation) in a narrow set of circumstances including the situation presented here. When the subject of a tax (such as income or intangible property) does not have a single definite location giving a single state plenary control over it, this Court has repeatedly permitted taxation both by a state having a legitimate connection to the subject of the tax (e.g., to the income or the intangible) and by the owner's domicile. See, e.g., *Curry v. McCanless*, *supra*; *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937); *Shaffer v. Carter*, 252 U.S. 37 (1920). In other words, domicile is a legitimate basis for double taxation involving subjects

of tax that are not necessarily site-specific. The Court has thus recognized, on grounds equally applicable under the Commerce Clause, that domicile of owner and situs of property or activity are distinct bases of taxation—a doctrine that the Court would have to abandon in order to apply the internal consistency test as Ford urges.

To accept Ford's argument would also be contrary to the practical, realistic approach reflected in *Complete Auto*. Ford's proposed application of the internal consistency test would require hypothesizing a problem *twice* removed from the tax actually imposed by Florida on Ford—it relies on the supposition that the domiciliary tax Florida imposed on *other* persons had also been imposed on Ford by *another* state. Moreover, invalidating Florida's business situs intangible tax based on internal inconsistency would produce anomalous results. For example, Ford's single tax on its intangibles would be invalid even though Ford's argument here would permit double taxation of its intangibles (if Florida had only the business situs tax and Michigan had the domiciliary tax). In addition, Ford's argument would produce an actual favoring of nonresidents over their competitors who are residents of Florida—a form of reverse discrimination the Commerce Clause does not require.

More generally, extending Ford's hypothetical test to this case would take the Commerce Clause far beyond its core concern with impediments to interstate commerce and would do so with no practical justification. A more realistic direct analysis of fair apportionment (including *external* consistency analysis) already forbids actual state overreaching; and there is no practical need to resort here to Ford's hypothetical internal consistency test, as there is in the income tax area (where businesses face a risk of taxation many times over by up to 50 states). The "internal consistency" test is properly limited, in fair apportionment cases, to ensuring that states follow the logic of their own bases of taxation. Florida's tax passes that test.

## ARGUMENT

### I. THE BUSINESS SITUS INTANGIBLE PROPERTY TAX IMPOSED ON FORD IS VALID UNDER THE COMMERCE CLAUSE.

In *Complete Auto*, this Court articulated a four-part test for assessing the validity of a state tax under the Commerce Clause: the tax is valid if the subject of the tax has a substantial nexus to the taxing state, the tax is fairly related to the protections afforded by the state, the tax is fairly apportioned, and the tax does not discriminate against interstate commerce. 430 U.S. at 279. That test reflects the Court's effort to "establish a consistent and rational method of inquiry" focusing on "the practical effect of a challenged tax." *Commonwealth Edison*, 453 U.S. at 616 (quoting *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980)). In recent years, the Court has regularly followed the *Complete Auto* analysis. See, e.g., *Goldberg v. Sweet*, 109 S. Ct. 582 (1989); *Amerada Hess Corp. v. Director, Div. of Taxation*, 109 S. Ct. 1617 (1989); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988). If the prescribed analysis is followed here, the business situs intangible property tax imposed by Florida on Ford—the tax actually at issue—readily withstands scrutiny under the Commerce Clause.

A. *Nexus and Fair Relation*. There is no dispute here, nor could there be, that, first, the subject of the business situs tax—Ford's accounts receivable—had a substantial nexus to Florida and that, second, the measure of the tax—the value of the receivables—bore a fair relation to the protections afforded Ford's receivables by Florida. See *Commonwealth Edison*, 453 U.S. at 626 ("fair relation" prong of *Complete Auto* test requires "that the *measure* of the tax must be reasonably related to the extent of the contact"). Ford's accounts receivable arose out of sales in Florida arranged through Flor-

ida business offices employing Florida residents; they were owed and paid by Florida debtors and processed through Florida financial institutions; their servicing was conducted through Florida branch offices; they typically were secured by property in Florida; and they relied on Florida government authorities in recording liens on that property and, if necessary, in collecting on the loans. The first two components of the *Complete Auto* test are easily satisfied because the value of Ford's receivables, beginning with their very creation, depended substantially on privileges granted to Ford in Florida.

B. *Fair Apportionment*. Florida's tax on the full value of Ford's accounts receivable based on their business situs was fairly apportioned. The Court has explained that "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg v. Sweet*, 109 S. Ct. at 588. The Court has further explained that "in order to show unfair apportionment, a taxpayer 'must demonstrate that there is no rational relationship between the income attributed to the State and the intrastate values of the enterprise.'" *Amerada Hess Corp. v. Director, Div. of Taxation*, 109 S. Ct. at 1622 (quoting *Container Corp.*, 463 U.S. at 180; omitting internal quotation marks). Transposed to the property tax context, the same basic notions require that states avoid taxing property that is not fairly within their jurisdiction. See, e.g., *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U.S. 18 (1891). That requirement is met here.

1. To begin with, Ford has effectively conceded that Florida may properly tax the full value of its receivables with a Florida business situs. Ford states: "Florida could choose to tax the entire value of all intangibles that arise out of a sale of property in the state." Brief for Appellant 25. Florida in fact chose to tax only a portion of such intangibles—those which retained a suffi-

cient connection to Florida in any given tax year. See pages 8-9, *supra*.<sup>12</sup>

Florida plainly was entitled to tax the full value of Ford's accounts receivable based on their business situs. For Commerce Clause purposes, it might well be sufficient that Florida was undoubtedly the place where the competition between financing companies took place for the creation of these receivables: Florida could fairly claim to be the sole site of that competition. See J.A. 11 ("At the retail level, [Ford] actively competed with local banks to provide financing."). In any event, Florida was the state where the receivables not only were created but were serviced by Florida employees in Florida offices using Florida banks, were paid by Florida debtors, were secured by Florida property, were recorded through Florida government offices, and were enforced through Florida courts (if necessary). Given these pervasive connections between the receivables and Florida, it can fairly be concluded that, on the present record, no other state could reasonably have claimed business situs as a basis for taxing the receivables. If any receivable acquired the protections and privileges necessary to obtain a business situs in another state—and, as explained above, Florida recognized that an account receivable *could* relinquish its Florida business situs in certain circumstances—there is no basis in this record for so concluding and no suggestion by Ford to that effect.

Thus, because the *basis* of the business situs tax—namely, business situs—was uniquely in Florida, there was no need for Florida to tax only a portion of the receivables' value. In this respect, this case is unlike every case that Ford cites involving Commerce Clause challenges to property taxes. See Brief for Appellant 30.

<sup>12</sup> This was the only intangible tax Ford was assessed. Ford seeks to broaden the analysis by reference to the domiciliary tax, to which Ford, of course, was not subject. We address that issue at pages 26-38, *infra*.

In all of those cases, the tax at issue was based on presence in the state of property used in a business, and that same basis was shared by more than one state: the property—the railroad rolling stock, freight cars, flight equipment, vessels, airplanes—was actually present as part of the taxpayer's business in several states.<sup>13</sup> Those cases merely illustrate that, when "the property is subject to taxation by more than one jurisdiction" (*ibid.*) on the same basis, the value of the property must be apportioned. In this case, no such apportionment was required because Florida was the only state that could tax the accounts receivable based on their business situs.

The business situs tax is also different from the taxes at issue in other cases raising apportionment problems. Unlike the income taxes at issue in the line of cases including *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959), and *Container Corp.*, 463 U.S. 159, for example, the Florida tax did not start with a concededly multistate quantity and then claim a share of it. Rather than seek to tax a proportion of Ford's intangible property company-wide, Florida applied its tax only to those accounts receivable with an identifiable Florida business situs.<sup>14</sup> Similarly, Florida's business situs tax was not a flat tax imposed on a variable basis. Unlike the flat tax expressly based on highway use, for example (*American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987)), the Florida tax varied in amount according to the amount of intangible property meeting

<sup>13</sup> See *Norfolk & W. Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317 (1968); *Central R.R. v. Pennsylvania*, 370 U.S. 607 (1962); *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization*, 347 U.S. 590 (1954); *Standard Oil Co. v. Peck*, 342 U.S. 382 (1952); *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949); *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944); *American Refrigerator Transit Co. v. Hall*, 174 U.S. 70 (1899).

<sup>14</sup> That is, Florida used a form of separate accounting for its business situs tax.

the business situs definition. In short, the Florida business situs tax was imposed on a basis that is wholly Florida's and was tied to the magnitude of the basis of the tax. It was therefore fairly apportioned.

This Court, in fact, has already held that a tax like Florida's is fairly apportioned. In *Curry v. McCanless*, *supra*, and *State Tax Comm'n v. Aldrich*, *supra*, this Court held, reaffirming an earlier line of cases, *see, e.g., Liverpool & L. & G. Ins. Co. v. New Orleans*, 321 U.S. 346 (1911); *Metropolitan Life Ins. Co. v. New Orleans*, 205 U.S. 395 (1907); *Blackstone v. Miller*, 188 U.S. 189 (1903), that a state could tax the full value of intangible property having a legitimate situs in that state (even though the state of domicile might also tax the same property). Although those decisions involved Due Process Clause claims, they simultaneously establish fair apportionment for purposes of Commerce Clause analysis.<sup>15</sup> This Court has held that fair apportionment is a requirement of both clauses. *See, e.g., Container Corp.*, 463 U.S. at 169; *Exxon Corp. v. Wisconsin Dep't of Revenue*, 447 U.S. 207, 227-28 (1980); *Norfolk & W. Ry. v. Missouri State Tax Comm'n*, 390 U.S. 317, 324-25 (1986).<sup>16</sup> Thus, the Florida business situs tax cannot be held to be un-

<sup>15</sup> The Commerce Clause has not, to our knowledge, ever been applied to an intangible property tax or, indeed, to any property tax except insofar as the property involved consisted of goods transported in interstate commerce or of instrumentalities (such as vehicles) used in carrying on such commerce. *See* P. Hartman, *Federal Limitations on State and Local Taxation* § 7.1, at 381-82 (1981). All of the Commerce Clause property tax decisions cited by Ford fall into those categories. Although Ford also cites one Commerce Clause case involving intangibles, *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977), the tax at issue was not a property tax, but a tax on stock transfers resulting from commercial transactions—one that, indeed, facially discriminated according to the place of sale.

<sup>16</sup> *See* J. Hellerstein & W. Hellerstein, *State and Local Taxation* 830 n.16 (5th ed. 1988) ("the conception of extraterritoriality as the basis for invalidating taxes under the Due Process Clause and

fairly apportioned without declaring that it violates the Due Process Clause, a proposition this Court has long rejected.

2. This Court has on a number of occasions analyzed "whether a tax is fairly apportioned by examining whether it is internally and externally consistent." *Goldberg v. Sweet*, 109 S. Ct. at 588. External consistency is not raised in this case; and in any event, given that the case involves a property tax based on a unique business situs, Florida plainly did not tax more than "that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed." *Id.* at 589. Ford does complain of internal inconsistency, but that complaint—insofar as it looks to the business situs tax actually imposed on Ford, rather than to the additional tax imposed on domiciliaries (*see* pages 26-38, *infra*)—rests upon a misunderstanding of the tax.

Applying the internal consistency test, Ford argues that double taxation might have resulted if other states had adopted the business situs tax because, Ford says, the tax was imposed if either the sale giving rise to the accounts receivable occurred in Florida or the vehicles were delivered in Florida (so that the tax could be imposed by the state of sale and the state of delivery). Brief for Appellant 22. That argument is unavailing for two reasons. First, as explained above (page 7, *supra*), Florida did not treat sale and delivery as alternative bases for finding a business situs. If delivery was to occur outside Florida as part of the sale, so that the sale would not have been considered in Florida for purposes

the requirement of apportionment as the prerequisite of validation under the Commerce Clause . . . simmer down to essentially the same result, namely, that a State can tax only what is 'justly attributable' to it"); P. Hartman, *supra*, § 2.3, at 21 ("an unfair apportionment is constitutionally invalid, both because an illegal restraint is imposed on interstate commerce, and because it is a violation of the due process clause").

of the Florida sales tax, Florida would not have treated the sale as in Florida for purposes of the intangible property tax either.<sup>17</sup>

Second, and in any event, Ford has not alleged facts making any supposed divergence between sale and delivery applicable to it. There is no allegation that Florida retail sales ever occurred without delivery in Florida. And the only aspect of wholesale sales alleged to have occurred outside Florida, title transfer, was insufficient by itself to remove the sale from Florida, given that the placement and acceptance of the offer, the delivery of the goods, and the transfer of risk of loss all occurred in Florida. In these circumstances, both in general and as applied to Ford, the business situs intangible property tax did not rest on alternative conditions that could have allowed several states applying the same tax each to claim business situs.

C. *Discrimination.* Ford acknowledges that, if Florida's tax is not unfairly apportioned, there is no independent problem of discrimination in this case. Ford argues that "the cause of the problem is the state's failure to apportion the tax" (Brief for Appellant 24), alleging merely that an unfairly apportioned tax is by definition discriminatory (*id.* at 25). That position follows from Ford's limitation of the question presented to whether the Florida tax is invalid under the internal consistency test, a test that this Court has treated as a part of the apportionment inquiry (*see Goldberg v. Sweet*, 109 S. Ct. at 588) unless discriminatory favoring of in-state competitors or activity has been shown

<sup>17</sup> Thus, Florida followed this Court's own practice with regard to the location of sales for taxing purposes. The Court "has generally allowed the state of destination to tax retail sales transactions while forbidding the state of origin" to do so. Hellestein, *Is "Internal Consistency" Foolish?: Reflections On An Emerging Commerce Clause Restraint On State Taxation*, 87 Mich. L. Rev. 138, 174 (1988).

directly (*see Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. at 240-47; *Armco, Inc. v. Hardesty*, 467 U.S. at 644).

In any event, the Florida business situs intangible property tax did not discriminate against interstate commerce. The Florida tax did not in any way relieve Florida residents of the business situs tax paid by its nonresident competitors such as Ford. All persons competing for the financing of Florida sales paid the same tax on the accounts receivable resulting from those sales. Indeed, the express aim of the business situs tax was to ensure that all competitors for such financing were subject to the same tax. Fla. Stat. § 199.112(1); *Allis-Chalmers Credit Corp. v. Department of Revenue*, 456 So. 2d at 902. Nor did Florida exempt Florida residents from some other tax so as indirectly, but just as effectively, to subsidize the offering of financing by Florida residents. To the contrary, Florida residents, being subject to the domiciliary tax, had an added tax burden to carry, not a lesser one that favored them over their nonresident competitors such as Ford.

## II. THE INTERNAL CONSISTENCY TEST SHOULD NOT BE EXTENDED TO INVALIDATE FLORIDA'S BUSINESS SITUS TAX BASED ON THE HYPOTHETICAL ADOPTION BY A DIFFERENT STATE OF A DIFFERENT TAX IMPOSED ON A DIFFERENT BASIS.

Notwithstanding that a direct application of the *Complete Auto* analysis demonstrates the validity of Florida's business situs intangible property tax as applied here, Ford seeks constitutional protection from the tax by urging application of the internal consistency test based on the assumption that Michigan had adopted Florida's domiciliary intangible tax as well as its business situs tax. The internal consistency test, however, has never been applied in the manner suggested or in circumstances like those presented here. To extend it to this

case, moreover, would require repudiation of longstanding doctrine permitting even actual double taxation based on domicile where the subjects of the tax, like intangibles, are not uniquely within a single state's authority. For that and other reasons, Ford's proposed extension of the test would be an inappropriate expansion of Commerce Clause restrictions on state taxing authority.

### A. This Court Has Never Applied The Internal Consistency Test In Circumstances Like The Present.

Ford suggests that this Court's precedent already establishes that a finding of internal consistency is always an essential prerequisite to rejecting a challenge under the Commerce Clause. Brief for Appellant 15-22. As an initial matter, we note that the suggestion is incorrect. The test, of course, was not even articulated until 1983 in *Container Corp.*, 463 U.S. at 169, and it was not used in striking down a tax until 1984 in *Armco, Inc. v. Hardesty*, 467 U.S. at 644. Even since then, this Court has decided Commerce Clause tax cases without making reference to the test. *See, e.g., Amerada Hess Corp. v. Director, Div. of Taxation*, 109 S. Ct. 1617 (1989); *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988). More important, perhaps, it is clear that the Court has never applied the test either in the manner Ford urges or relied on it to invalidate any tax like the present.

To date, the Court has applied the internal consistency test by focusing on the statutory provisions that directly affected the complaining taxpayers: that is, by looking to the very tax paid by the taxpayer, along with exemptions from that tax extended to its competitors. *See Goldberg v. Sweet*, 109 S. Ct. at 589; *American Trucking Ass'ns v. Scheiner*, 483 U.S. at 284; *Tyler Pipe Indus., Inc. v. Washington Dep't of Revenue*, 483 U.S. at 247; *Armco, Inc. v. Hardesty*, 467 U.S. at 644; *Container Corp.*, 463 U.S. at 169. In the present case, Ford must propose a different method, because it is subject only to the business situs tax, which contains no pertinent

exemptions and which readily passes the internal consistency test as this Court has applied it. See pages 24-25, *supra*. Ford suggests, therefore, that the Court hypothesize not just that other states had adopted the business situs tax but that other states (in particular, Michigan) had adopted that tax *and* also an additional tax imposed by Florida on other persons (the domiciliary tax applied to Florida residents). This new approach would mark a quite different use of the internal consistency test.

Second, the internal consistency test has never been applied to strike down a tax where, as here, there has been neither discrimination by unequal taxation or exemption nor failure by a state to apportion its tax according to its own asserted basis for the tax. The Court has relied on the test in three cases invalidating state taxes. In *Scheiner*, the Court used the test to explain that Pennsylvania had not fairly apportioned its flat tax, where the tax was based on highway use but the tax was not apportioned to the magnitude of such use. 483 U.S. at 284. In the other two cases, the Court relied on the test only after directly finding to be discriminatory an exemption for local commerce denied to out-of-state commerce. In *Armco*, the Court first directly condemned as discriminatory a West Virginia wholesale tax that exempted local manufacturers, thus disfavoring their out-of-state competitors who sold their goods at wholesale in the state. 467 U.S. at 642. The Court then relied on the internal consistency test to reject the asserted defense that the complaining taxpayer should have to prove that its total tax burden was higher by identifying the taxes it paid where it manufactured its goods. 467 U.S. at 644-45. Similarly, in *Tyler Pipe*, the Court directly found discrimination: Washington required all out-of-state manufacturers to pay a tax when they sold their goods in the state, without offset for any manufacturing tax they incurred, while in-state manufacturers were granted such an offset, thus disfavoring the out-of-state manufacturers who competed for sales

in Washington. 483 U.S. at 240-46.<sup>18</sup> The Court then relied on the internal consistency test to reject the same defense as in *Armco*. 483 U.S. at 247.

In all three cases, the internal consistency test was put to limited use—either in rejecting a defense to what the Court found to be a facially discriminatory tax (in *Armco* and *Tyler Pipe*) or, more affirmatively, in explaining that a state had failed to apportion the tax according to its asserted basis for the tax (in *Scheiner*).<sup>19</sup> Neither situation is present here. The Florida business situs tax plainly was not discriminatory;<sup>20</sup> nor did Florida fail to apportion the tax according to its asserted basis. That is so not only as to the business situs tax alone but also as to that tax considered in conjunction with the domiciliary tax. Because the basis of the latter tax (domicile) is different from the basis of the tax imposed on Ford (business situs), both taxes may be imposed without any internal inconsistency in the ordinary

<sup>18</sup> From a different angle, the Washington tax discriminatorily penalized in-state manufacturers that sold outside Washington by imposing the manufacturing tax on them while exempting from the manufacturing tax those manufacturers which sold in Washington. 483 U.S. at 240-46. In addition, as the Court took care to point out, the entire taxing scheme at issue was in fact merely a redrafted form, with identical economic benefits to in-state manufacturers that sold inside Washington, of an earlier version that had a directly discriminatory selling tax—one that exempted in-state manufacturers from the selling tax applied to out-of-state manufacturers. 483 U.S. at 235-37.

<sup>19</sup> The Court in *Container Corp.* made this latter use of the test in holding a state to its own asserted basis for apportioning to itself a proper share of company-wide multistate income. 463 U.S. at 169. When a state taxes income based on the connection of the income to the state, that same basis may be used by other states, and the taxing state therefore must use an apportionment method that shares that basis for taxation with the other states.

<sup>20</sup> Nor, unlike the tax at issue in *Tyler Pipe*, was the Florida tax enacted to retain in masked form a previous, invalidated discriminatory tax.

and original sense of that phrase—that is, without the state being justly accused of violating the logic of its own basis of taxation. Thus, Ford's argument asks this Court to make an unprecedented use of the internal consistency test.

**B. This Court Should Not Extend The Internal Consistency Test To Invalidate The State Tax At Issue Here.**

**1. The Objections To Multiple Taxation That Underlie The Internal Consistency Test Have Been Soundly Rejected In The Present Circumstances.**

Application of the internal consistency test as Ford proposes would not only require an extension of existing precedent but would, in fact, run headlong into well-established precedent. The internal consistency test rests, by its very terms, on a constitutional concern with "eliminating exposure to the burden of a multiple tax" (*Tyler Pipe*, 483 U.S. at 246) in some circumstances.<sup>21</sup> In a narrow class of cases that includes this case, however, that concern has long been laid aside. Where, as here, any such multiple taxation would be attributable to a state's special power to tax on the basis of domicile and where the subject of the tax is not uniquely and wholly situated within a different state, and therefore within its exclusive authority, multiple taxation is permissible.

That principle has been applied in two important settings. As already noted, it has long been established that intangible property may be taxed by both the state of its owner's domicile and the state where the property has a legitimate situs. *See* page 23, *supra*. It is equally well established that states may tax both their residents' en-

<sup>21</sup> The internal consistency test, of course, permits some double taxation. As Ford acknowledges (Brief for Appellant 27-28), the test would allow the double taxation that would occur if Michigan adopted a domiciliary tax and Florida imposed the business situs tax.

tire income—even where the income results from interstate business—and the income of nonresidents earned in the state, even though double taxation results from such a scheme if adopted nationwide. *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937); *Lawrence v. State Tax Comm'n*, 286 U.S. 276 (1932); *Shaffer v. Carter*, 252 U.S. 37 (1920); *see Curry v. McCanless*, 307 U.S. at 363 n.1. *See generally* J. Hellerstein & W. Hellerstein, *State and Local Taxation* 829-30, 864-65.

The internal consistency test runs afoul of those decisions, not because they are wrong, but because the test makes no allowance for those situations in which double taxation is entirely consistent with constitutional principles. In the present circumstances, for example, the Court has recognized that domicile provides a basis for taxation that is very different from situs. *See, e.g., New York ex rel. Cohn v. Graves*, 300 U.S. at 313. The domicile and situs states afford different protections, benefits, and privileges for which each may demand a return. The domicile protects and benefits—and, in the case of corporations, often gives life and definition to—the owner and its enjoyment of the fruits of what it owns. *Ibid.* The situs state, when situs is legitimately defined, protects, benefits, and gives value to the intangible property located there or income earned there—as Florida did here in the numerous ways in which it gave value to Ford's accounts receivable. *Shaffer v. Carter*, 252 U.S. at 50.

Whereas situs as a basis of taxation cannot support taxation beyond values properly tied to the situs state, domicile logically may extend to all that the domiciliary owns. That principle, standing alone, could support a

<sup>22</sup> For similar reasons, this Court has long recognized that domicile and presence are distinct and independently sufficient bases for a state's assertion of its judicial power over a person. *See, e.g., Milliken v. Meyer*, 311 U.S. 457, 462-63 (1940); *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 723 (1877).

domicile state's taxation of all of its residents' property, of whatever kind and wherever located. See Bittker, *The Taxation of Out-of-State Tangible Property*, 56 Yale L.J. 640 (1947). But by longstanding precedent, a countervailing principle limits the reach of domicile as a basis for taxation. Real property and tangible personal property, like certain activities such as sales (*Tyler Pipe*, 483 U.S. at 251) and mineral severance (*Commonwealth Edison Co. v. Montana*, 453 U.S. at 617), have a unique physical location and thereby come within the plenary authority of that state.<sup>23</sup> As to such site-specific subjects of taxation, only the situs state may tax. See, e.g., *Central R.R. v. Pennsylvania*, 370 U.S. 607, 612-14 (1962); *Curry v. McCannless*, 307 U.S. at 364. But other taxes are not necessarily site-specific in that sense—for example, an income tax on a unitary business's net income whose creation may be attributable to activities in many states, or a property tax on intangible property that may take its value from a number of states.<sup>24</sup> In those circumstances, no single state has actual control over the subject of the tax, and there is no counterweight limiting domicile as a distinctive basis for taxation to supplement the basis that may be claimed by each state where the subject has a legitimate situs.

This doctrine approving double taxation in the present case and related contexts cannot be avoided on the ground that this case involves the Commerce Clause. For one

<sup>23</sup> See *Pennoyer v. Neff*, 95 U.S. (5 Otto) at 722 ("every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . [and] no State can exercise direct jurisdiction and authority over persons or property without its territory").

<sup>24</sup> Although Ford's accounts receivable, as reflected in the present record, are so pervasively connected to Florida that no other situs would seem possible, there is obviously a vast spectrum of possible connections (debtor, security, management, financing, etc.) between any given type of intangible property (debts, stocks, deposits, etc.) and particular states.

thing, in *Shaffer v. Carter*, the Court rejected Commerce Clause as well as Due Process Clause challenges to the state income tax statute—which, remarkably like the statute in this case, effectively created two taxes, one reaching all income of domiciliaries, another reaching only in-state income of non-domiciliaries. 252 U.S. at 56-57. Moreover, several of the decisions explicitly indicated that the doctrine applied where the income at issue was generated by interstate business. See, e.g., *New York ex rel. Cohn v. Graves*, 300 U.S. at 313; *Metropolitan Life Ins. Co. v. New Orleans*, *supra*. In any event, as noted above, this Court has explained that, where, as here, there is no discrimination between competitors based on state boundaries, the Commerce Clause is not violated if the requirements of the Due Process Clause are met: there is no lack of fair apportionment if two states rely on two distinct bases of taxation to tax the same subject. See pages 23-24, *supra*.

Indeed, there can be little justification for denying each state its distinct and legitimate taxing authority under the Commerce Clause. Ford does not question the authority of a state to tax intangibles with a situs such as that present here; nor does Ford question domicile as a legitimate basis for taxing intangibles with a situs outside the boundaries of the taxing state. What it seeks to do, instead, is to invoke a test that makes no provision for multiple legitimate bases for taxation and to use that test to strike down an otherwise valid tax. The Court should reject that effort.<sup>25</sup>

<sup>25</sup> We also note that it would be anomalous to fashion new Commerce Clause constraints on state taxes that conform to due process when the Commerce Clause has never before even been applied to an intangible property tax. See note 15, *supra*. It would be especially anomalous to strike down a tax under the Commerce Clause where the potential for double taxation was directly traceable to a (theoretically adopted) tax on domiciliaries. This Court recently ruled that the Commerce Clause simply does not "protect state residents from their own state taxes." *Goldberg v. Sweet*, 109 S. Ct. at 591.

**2. Extension Of The Internal Consistency Test To This Case Would Be An Inappropriate Tightening Of Commerce Clause Restrictions On State Taxing Authority.**

In any event, to extend the internal consistency test as Ford wishes would dilute Commerce Clause analysis rather than strengthen it. Although Ford correctly points out that, "[a]t least since the decision in *Complete Auto*, it has been clear that the validity of a state tax under the Commerce Clause depends, not on its form, but on its 'practical effect' in light of 'economic realities'" (Brief for Appellant 29, quoting 430 U.S. at 279), its argument is ironically self-defeating. The very essence of the internal consistency test, if taken beyond its narrow uses to date, would be to require an increasingly hypothetical analysis unfocused on actual state overreaching or on concrete impediments to or discrimination against interstate commerce. See *Ashland Oil, Inc. v. Caryl*, 110 S. Ct. 3202, 3205 (1990) (noting criticism of internal consistency test as "a retreat from the economically realistic approach adopted by *Complete Auto*").

The hypothetical nature of the proposed inquiry in this case is especially pronounced: as a practical matter, the potential for double taxation on which Ford relies is *twice* removed from the tax actually imposed by Florida on Ford. The approach Ford presses would first look away from Florida's business situs intangible tax to its domiciliary intangible property tax, which Ford does not pay. It would then imagine that another state, Michigan, adopted that tax (which it has not). Finding a Commerce Clause violation in these circumstances, where there was no actual impediment to interstate commerce<sup>26</sup> and there were entirely legitimate and nondiscriminatory bases for both types of Florida tax, would be inconsistent with the *Complete Auto* commitment to focusing on practicalities in respecting the "extremely limited restric-

<sup>26</sup> Even in amount, the tax is small—\$10 on a \$10,000 loan.

tions" the Commerce Clause places on state taxing authority. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. at 457 (internal quotation marks omitted).

The difficulties with Ford's approach are reflected in the series of anomalous results that it would (indeed, is intended to) produce. According to Ford, it may be relieved of the obligation to pay the Florida business situs tax, even though it concedes that, at least with regard to the claim made before this Court, it could be subjected to *actual* double taxation on its Florida intangibles if Michigan adopted a domiciliary intangible tax and Florida had only the business situs intangible tax. Looked at another way, Ford concedes that it would have to pay the Florida business situs tax provided that Florida repealed its tax on out-of-state intangibles owned by domiciliary corporations—even though the only practical effect of that repeal on Ford would be to *lower* the taxes of its competitors. Moreover, the immediate result of invalidating the business situs tax, as Ford asks in seeking to be excused from payment of the tax, would be to produce a discrimination *against* Florida domiciliaries, who would have to pay a tax on their Florida-based intangibles even while their nonresident competitors did not. Although the Commerce Clause may not forbid such disfavoring of domiciliaries (see *Goldberg v. Sweet*, 109 S. Ct. at 591), surely it does not require that result.

There may be cases where the constitutionality of a state tax can be tested only by means of abstract, highly speculative inquiries, but this case is surely not one of them. If, for example, a state's method of apportioning an income tax on a multistate business is challenged, it seems obvious that the courts cannot undertake in every case to examine the various income taxes, potential or actual, of the numerous states in which that business operates. Cf. *Armco, Inc. v. Hardesty*, 467 U.S. at 644-45 (courts need not analyze "shifting complexities of

the tax codes of 49 other States"). The internal consistency test in that setting, used as a threshold test for fair apportionment, serves to avoid a judicially unmanageable task, allowing the courts to assess the adequacy of the state's chosen apportionment method. See *Container Corp.*, 463 U.S. at 169.<sup>27</sup> In the present setting, by contrast, there is no such practical problem with a direct application of a realistic fair apportionment analysis (including the external consistency test), as such analysis requires consideration only of the legitimate taxing authority of the domicile and situs states. There is correspondingly less justification for avoiding the more realistic analysis by adopting the necessarily hypothetical internal consistency test Ford proposes.

This Court can respect the full and proper meaning of "internal consistency," moreover, without subjecting every state tax statute to a mechanical test of potential double taxation on the hypothesis of universal adoption. Putting aside cases involving direct discrimination—where the test serves at most a backup function explaining that such a tax is invalid without regard to burdensome, shifting, case-by-case analysis of the potentially offsetting effects of taxes in surrounding states (see *Tyler Pipe*, 483 U.S. at 247; *Armco, Inc. v. Hardesty*, 467 U.S. at 644-45)—the internal consistency test simply requires that, when a state puts forward a basis of taxation, it must be internally consistent in following the logic of that basis of taxation. Thus, in *Container Corp.*, when the state taxed a share of the taxpayer's overall income on the ground that it made some contribution to it, the state was required to employ a method of appor-

<sup>27</sup> Of course, the practical problem presented in the income tax context is not presented in cases such as *Armco* and *Tyler Pipe*. But those cases involve discrimination between competitors, a problem that is absent in the present case and that calls for use of the internal consistency test, if at all, in a more limited, defensive role. See pages 28-29, *supra*.

tionment whose own logic recognized that the state was taking a share of a single whole shared by other states that made contributions to the overall income; hence, the method, if adopted by all states, had to produce a tax base amounting to that whole. Similarly, in *Scheiner*, when the state imposed a tax based on highway use, it was obliged to be internally consistent in fitting the amount of the tax to the amount of such use (if no administrative difficulties made that infeasible). When a state has two distinct bases for somewhat different taxes, however, the state has not violated its own internal logic, and there is no violation of the test.

In the end, much of Ford's argument rests on the notion that simplicity is a sufficient ground for adoption of a mechanical rule requiring universal testing of state tax laws by hypothesizing that other states have adopted them (or, as here, have adopted other related laws). See Brief for Appellant 21. But such a single-minded focus on mechanical simplicity is out of place in Commerce Clause doctrine. This Court has recognized that, in making "the delicate adjustment between the national interest in free and open trade and the legitimate interest of the individual States in exercising their taxing powers," a proper inquiry does not depend on mechanical tests, but instead "turns on the unique characteristics of the statute at issue and the particular circumstances in each case." *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977). Where, as here, both precedent and sound principle support preservation of a state taxing authority that causes no discernable interference with interstate commerce; where there is no potential for taxation many times over (as with income taxes paid by a nationwide business), because the sole basis of any potential multiplicity is domicile; where the state has a strong non-discrimination interest of its own in preserving the tax; and where any future problems caused by the intangible property tax can always be addressed by

Congress (as well as multistate tax conferences)—Commerce Clause doctrine should not be altered to impose a new limit striking down this long-approved tax.

### CONCLUSION

If the appeal is not dismissed, the judgment of the District Court of Appeal of Florida, First District, should be affirmed.

Respectfully submitted,

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